Supreme Court, U.S.
FILED

No. 05-496 JUN 28 2005

OFFICE OF THE CLERK

In the Supreme Court of the United States

CARL RICHARD,

PETITIONER,

vs.

STATE OF INDIANA,

RESPONDENT

Petition for a Writ of Certiorari to the Indiana Court of Appeals and the Indiana Supreme Court (denial of petitioner transfer)

BRIEF OF PETITIONER

DALE ALLEN
Indiana Attorney I.D. # 10485-64
Allen Law Offices
701 E. Lincolnway
Valparaiso, Indiana 46383
Telephone: (219) 462-3998
Facsimile: (219) 531-0683
Counsel of Record for Petitioner, Carl Richard

QUESTION PRESENTED

Whether Cpl. Matt Campbell's Affidavit for Search Warrant established probable cause to search under *Illinois v. Gates* when 8-year old Callie Richard's alleged hearsay statements were not credible under the totality of the circumstances.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Carl Richard, by counsel, Dale Allen, Esq. Allen Law Offices, 701 E. Lincolnway, Valparaiso, Indiana 46383; and the Respondent, State of Indiana, by counsel, Richard A. Brown, Esq., Fulton County Prosecuting Attorney, 815 Main Street, Room 301, P.O. Box 237, Rochester, Indiana 46875, and Steve Carter, Esq. & George P. Sherman, Esq., Office of the Indiana Attorney General, Indiana Government Center South, Fifth Floor, 302 W. Washington Street, Indianapolis, Indiana 46204.

TABLE OF CONTENTS

Page

I. OPINIONS BELOW.....1
II. JURISDICTION.....1
III. CONSTITUTIONAL PROVISION INVOLVED.....1
IV. STATEMENT OF THE CASE.....2
A. Factual Background.....2
B. Proceedings Below.....6
V. REASONS FOR GRANTING THE PETITION.....7
VI. ARGUMENT.....9
VII. CONCLUSION.....25
VIII. CERTIFICATE OF SERVICE.....26

TABLE OF AUTHORITIES

CASES **Page(s)**

Aguilar v. Texas, 378 U.S. 108 (1964).....8,10,11,12,14,15,17,20
Alabama v. White, 496 U.S. 325 (1990).....8,10
Culver v. State, 519 N.E.2d 196 (Ind. Ct. App. 1988).....11
Edwards v. Cabrera, 58 F.3d 290 (7th Cir. 1995).....21
Illinois v. Gates, 462 U.S. 213 (1983).....2,8,10,11,12,14,20
Jaggers v. State, 687 N.E.2d 180 (Ind. 1997).....11
Nardone v. U.S., 308 U.S. 338 (1939).....8
Nathanson v. U.S., 290 U.S. 41 (1933).....14
Richard v. State, 820 N.E.2d 749 (Ind. Ct. App. 2005), *transfer denied* (Mar. 31, 2005).....1
Stanely v. State, 313 A.2d 847 (Md. App. Ct. 1974).....18
State v. Allen, 525 N.E.2d 1267 (Ind. Ct. App. 1988).....11
Spinelli v. U.S., 393 U.S. 410 (1969).....8,10,11,12,14,15,17,20
U.S. v. Jones, 208 F.3d 603 (7th Cir. 2000).....11
U.S. v. McNeal, 82 F.Supp.2d 945 (S.D. Ind. 2000).....15,16
U.S. v. Pritchard, 745 F.2d 1112 (7th Cir. 1984).....10,11
U.S. v. Reddrick, 90 F.3d 1276 (7th Cir. 1996).....12
U.S. v. Singleton, 125 F.3d 1097 (7th Cir. 1997).....11,12
Whitely v. Warden, 401 U.S. 560 (1971).....14

CONSTITUTIONAL PROVISION AND STATUTE

U.S. CONST., amend. IV.....1,7,8
28 U.S.C. § 1257(a).....1

MISCELLANEOUS

Welsh S. White, *Miranda's Waning Protections*, 202 (2001).....22

PETITION FOR A WRIT OF CERTIORARI

Carl Richard, by counsel, respectfully petitions for a writ to review the judgment of the Indiana Court of Appeals and the Indiana Supreme Court (denial of petition to transfer) in this case.

I. OPINIONS BELOW

The opinion of the Indiana Court of Appeals (*See* Appendix) is reported at *Richard v. State,* 820 N.E.2d 749 (Ind. Ct. App. 2005), *transfer denied* (Mar. 31, 2005). The text of the denial of transfer (*See* Appendix) is unreported.

II. JURISDICTION

The judgment of the Indiana Court of Appeals (*See* Appendix) was entered on January 14, 2005. The denial of transfer by the Indiana Supreme Court (*See* Appendix) was entered on March 31, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

III. CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

IV. STATEMENT OF THE CASE

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. In the present case, a police officer searched Petitioner, Carl Richard's, residence and dairy farm pursuant to a search warrant, which was based exclusively on hearsay allegations from Richard's eight-year old daughter. Richard challenged the constitutionality of the search pursuant to Indiana and federal law. Specifically, with respect to Richard's federal claim, Richard argued that the probable cause was insufficient under *Illinois v.* Gates, 462 U.S. 213 (1983)'s totality of the circumstances test. The trial court and Indiana Court of Appeals both determined that the search warrant was supported by adequate probable cause supplied by the eight-year old child, which purportedly formed a "substantial basis" upon which the issuing judge could determine that there was a fair probability that evidence of marijuana would be found on Richard's property under both Indiana law and the Fourth Amendment. The Indiana Supreme Court denied transfer of jurisdiction on this and other issues raised by Richard; however, two of the three Justices voted to grant transfer.

This case presents one overall question for review:

Whether Cpl. Matt Campbell's Affidavit for Search Warrant established probable cause to search under *Illinois v. Gates* when 8-year old Callie Richard's alleged hearsay statements were not credible under the totality of the circumstances.

A. Factual Background.

On October 13, 2003, Cpl. Matt Campbell of the Rochester Police Department was contacted by Riddle Elementary School counselor Patty Keim. (Appendix at 11) Ms. Keim advised Cpl. Campbell that "she was approached by a student by the name of

Callie R. Richard and told her she had been in one of her barns on Friday, October 10 after school." (Id.) Ms. Keim further stated that Callie allegedly "observed what she believed was marijuana" in the barn. (Id.) Callie herself did not personally contact Cpl. Campbell and request to speak with him. (App. at 35) Thereafter, Cpl. Campbell advised Ms. Keim that he would "come to the school to speak to the student." (App. at 11)

Cpl. Campbell testified in his deposition that he did not take any investigative steps into this matter before he arrived at Riddle Elementary School. (App. at 36) In fact, Cpl. Campbell did not even know Callie Richard's name before he arrived at the school. (Id.) Interviewing Callie was Cpl. Campbell's first step with respect to this investigation. (Id.)

Shortly after Cpl. Campbell spoke with Ms. Keim he arrived at Riddle Elementary School at approximately 1:00 p.m. (App. at 11; 36) Cpl. Campbell questioned Callie in Ms. Keim's office. (App. at 37) Principal Jami Johnson was also present in Ms. Keim's office during the questioning. (Id.) Callie was sitting on a couch near Principal Johnson during the questioning. (Id.) All of the adults in the room were "fairly close" to Callie during the questioning. (Id.) Specifically, Cpl. Campbell was within "arm's reach" of Callie during the entire questioning. (Id.)

Callie Richard was eight (8) years old and in the third grade at the time Cpl. Campbell questioned her at Riddle Elementary School. (App. at 40) Cpl. Campbell described Callie's physical appearance as approximately a little under four foot in height and that she weighed eighty pounds. (Id.) Furthermore, Cpl. Campbell described Callie's body frame as being "pretty slender." (App. at 41)

At the time Cpl. Campbell interviewed Callie, he knew there was an ongoing "paternity suite" between Carl Richard and

his ex-wife, Carmen Richard. (App. at 51) Cpl. Campbell agreed in his deposition that it was entirely possible that Carmen Richard, or someone else, could have told Callie to make these allegations against her father in order to spite him. (App. at 51; 52)

During the questioning, Callie allegedly told Cpl. Campbell that she had recently had been in her barn and "found what she believed was marijuana." (App. at 11) Callie allegedly told Cpl. Campbell that "she knows what it is because she had been around it before." (Id.) Callie also allegedly told Cpl. Campbell that there was "plants drying" under some tarps and a blue tub that contained camouflage bags with some "plant material." (App. at 11-12) However, Cpl. Campbell stated in his deposition that it is possible that the substance in the barn that Callie allegedly referred to as "marijuana" could have been hay, straw, corn stalks or some other form of plant material. (App. at 47-48) In fact, Cpl. Campbell readily admitted in his deposition that he is "not a farmer" and does not "know a lot about the difference[s]" between hay and straw. (Id.)

Furthermore, Callie allegedly told Cpl. Campbell that there was "marijuana in the drawer near the stove" in her home. (App. at 12) Callie also allegedly advised Cpl. Campbell that at no time had there been "plants growing" in the basement of her home; however, she was "not [currently] aware of any plants in there." (Id.) Ms. Keim never told Cpl. Campbell as to why Callie allegedly contacted her regarding these matters. (App. at 43) Cpl. Campbell admitted that it is possible that Callie could have been mistaken with regard to the identification of the substance alleged to be "marijuana." (App. at 44) In fact, based on his own professional experience, Cpl. Campbell agreed that young children of eight to nine years of age or younger have tendencies to fabricate things and tell imaginative stories. (App. at 32)

Cpl. Campbell believed that Callie was qualified to identify the substance alleged to be marijuana based on "numerous rumors" that he heard concerning Richard's farm. (App. at 45) These "rumors" concerned marijuana allegedly found growing on Richard's farm during annual marijuana eradication activities by law enforcement; however, no marijuana was ever found on Richard's farm. (App. at 46) Furthermore, Cpl. Campbell believed that Callie was qualified to make such a determination based on a prior and unrelated arrest involving Richard that occurred "years ago." (Id.) This arrest occurred "before Callie was born." (Id.)

Incidentally, Cpl. Campbell was previously present on Richard's property as a guest for Richard's wedding. (App. at 78) The wedding took place in the basement of Richard's residence approximately one year prior to the October 13, 2003 search. (App. at 80-81) In fact, Cpl. Campbell's wife, Rebecca, and Richard's wife, Charla Richard, are "best friends." (App. at 78) While at the wedding, Richard gave Cpl. Campbell a tour of the property. (App. at 80)

Cpl. Campbell questioned Callie at the school for approximately fifteen (15) to twenty (20) minutes. (App. at 49) Immediately after Cpl. Campbell left the school, he prepared the Affidavit for Search Warrant. (App. at 50) Cpl. Campbell utilized the information that Callie allegedly gave him during the questioning as the sole basis for applying for the Search Warrant. (Id.) Cpl. Campbell did not take any further investigative steps concerning the information Callie provided him. (Id.) Notwithstanding the present case, Cpl. Campbell admitted that he takes additional investigative steps to corroborate information provided to him from informants "if it's possible." (App. at 29-30)

Cpl. Campbell also agreed in his deposition that establishing the credibility of a witness is important. (App. at 30)

The Search Warrant was issued on the same day as Callie's interview at approximately 1:58 p.m., or fifty-eight minutes after Cpl. Campbell arrived at Riddle Elementary School. (App. at 13; 50) Cpl. Campbell did not have any further contact with Callie after he left the school and before he served the Search Warrant. (App. at 49) Thereafter, Cpl. Campbell and other law enforcement officers from various agencies conducted a search on Richard's property and discovered contraband. (App. at 13-15)

B. Proceedings Below.

On October 17, 2003, Richard was charged by criminal information in the Fulton Circuit Court with, *inter alia*, two counts of Dealing In Marijuana. (App. at 8) The criminal charges arose after the October 13, 2003 search of Richard's residence, barn and dairy farm by Cpl. Matt Campbell revealed the presence of marijuana and paraphernalia. (App. at 13-15)

On December 22, 2003, Richard filed a motion to suppress. (App. at 102-35) The motion requested the trial court to suppress all of the evidence seized on October 13, 2003 since Cpl. Campbell's Affidavit for Search Warrant did not establish sufficient probable cause based on Callie Richard's alleged hearsay statements. (Id.) On February 9, 2004, the State filed its memorandum in opposition to Richard's motion and hand-delivered a copy to Richard's counsel on February 10, 2004, which was the same day that a hearing on Richard's motion was held. On February 25, 2004, the trial court denied Richard's motion. (App. at 255-56)

On February 27, 2004, Richard filed his Motion for Certification of Appeal of Interlocutory Order and Stay of

Proceedings Pending Appeal. (App. at 257-62) On March 3, 2004, the trial court denied said motion. (App. at 263-64)

On April 6, 2004, a bench trial was held before the Honorable Douglas B. Morton, and Richard's counsel made a continuing objection throughout the trial with respect to the admissibility of all of the evidence introduced by the State, arguing that it was illegally seized on October 13, 2003; however, the trial court overruled all of the objections. (App. at 278; 279-82) Richard was found guilty on the charges and was sentenced on April 28, 2004. (Id.)

Thereafter, Richard appealed to the Indiana Court of Appeals the issue of whether the search warrant was supported by adequate probable cause. On January 14, 2005, the Indiana Court of Appeals, per Judge Mathias, issued an opinion affirming the trial court's denial of Richard's Motion to Suppress. (*See* Appendix) The Court of Appeals held that the search warrant was supported by probable cause and, therefore, the trial court acted within its discretion when it admitted the evidence seized during the execution of the search warrant. (*See* Appendix) Richard did not file a Petition for Rehearing.

On February 4, 2005, Richard filed his Petition to Transfer to the Indiana Supreme Court. On February 28, 2005, the State filed its Response to Petition to Transfer. On March 9, 2005, Richard filed his Reply Brief on Transfer. On March 31, 2005, the Supreme Court denied transfer of jurisdiction; however, two of the five Justices voted to grant transfer of jurisdiction. (*See* Appendix)

V. REASONS FOR GRANTING THE PETITION

As it pertains to what must support the issuance of a search warrant, the text of the Fourth Amendment is clear and exacting:

"no Warrants shall issue but upon probable cause." U.S. CONST., amend. IV. This Court has diligently enforced this constitutional command requiring that a police officer must provide a magistrate with a "substantial basis" for determining the existence of probable cause for issuance of search warrant. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). And absent the principal means of effectuating this requirement is suppression of all evidence seized pursuant to the warrant. *Nardone v. U.S.*, 308 U.S. 338, 341 (1939).

In the instant case, despite its reliance on the Fourth Amendment, the Indiana Court of Appeals and the Indiana Supreme Court through its denial of transfer failed to properly acknowledge and apply the totality of circumstances test under *Illinois v. Gates* as it relates to Callie Richard's hearsay statements. The Indiana Court of Appeals accorded no significance to the purpose of the probable cause requirement of the Fourth Amendment. Specifically, the Indiana Court of Appeals failed to properly cite and consider the "credibility" and the "factual basis" prongs under the test, which remain highly relevant considerations in the probable cause calculus. *See, e.g., Alabama v. White*, 496 U.S. 325, 328 (1990) ("*Gates* made clear, however, that those factors that had been considered under *Aguilar* and *Spinelli*—an informant's 'veracity,' 'reliability,' and 'basis of knowledge'—remain 'highly relevant in determining the value of [a hearsay declarant's information].'").

In addition, the Indiana Court of Appeals failed to consider the following well-established factors which are used to evaluate the overall reliability of a hearsay statements in support of warrants under federal law: (1) whether the informant has given correct information in the past; (2) whether independent police investigation corroborates the informant's statements; (3) some basis for the informant's knowledge is demonstrated; or (4) the

informant predicts conduct or activities by the suspect that are not easily predicted. *Gates*, 462 U.S. at 238.

Further review of this case by this Court is necessary because the Indiana Court of Appeals' decision directly conflicts with this Court's precedents and with the decisions of the Seventh Circuit Court of Appeals. The Indiana Court of Appeals completely failed to recognize one of the central rights protected by the probable cause requirement of the Fourth Amendment: that the hearsay in support of a search warrant must form a ***substantial basis*** under which the issuing judge could determine that there is a fair probability that contraband or evidence of a crime will be found in a particular place. This is an important and recurring constitutional issue, which both state and federal judges deal with on a daily basis throughout the United States. Therefore, this Court should grant review to correct the Indiana Court of Appeals' erroneous decision.

VI. ARGUMENT

CPL. MATT CAMPBELL'S AFFIDAVIT FOR SEARCH WARRANT FAILED TO ESTABLISH PROBABLE CAUSE UNDER *ILLINOIS v. GATES* BECAUSE 8-YEAR OLD CALLIE RICHARD'S ALLEGED HEARSAY STATEMENTS WERE NOT CREDIBLE UNDER THE TOTALITY OF THE CIRCUMSTANCES.

A. Illinois v. Gates' "Totality of the Circumstances" Test.

Where the basis for probable cause rests upon the information provided by an informer, this Court developed a two-pronged test that required a determination that: (1) the informant was credible; and (2) there was a factual basis for the informant's